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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 961

HENRY F. BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The principal opinion of the court of appeals (Pet. App. A) is reported at 351 F.2d 868. A supplemental opinion (Pet. App. B) denying a petition for rehearing has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1965 (Pet. App. D). A petition for

rehearing was denied on December 15, 1965 (Pet. App. B). On January 11, 1966, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 28, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's indictment was invalid because he had been subpoenaed to testify before the grand jury, where he was fully advised of his right to counsel and of his privilege against self-incrimination.

2. Whether petitioner should have been granted a continuance because of unfavorable publicity.

3. Whether defense counsel was entitled to impeach a government witness by cross-examination regarding prior State convictions for misdemeanors relating to the witness' "numbers business".

4. Whether petitioner was entitled to examine the transcript of a government witness' testimony before the grand jury.

STATEMENT

Count 3 of a three-count indictment (D.A. 1a)[1] filed in the United States District Court for the Middle District of Tennessee charged petitioner with having corruptly endeavored to obstruct the adminis-

[1] "D.A." and "G.A." refer to petitioner's and the government's respective appendices to their briefs in the court of appeals, which are on file with the Clerk of this Court.

tration of justice in the 1962 criminal trial, in that court, of James R. Hoffa, in a case entitled *United States* v. *James R. Hoffa and Commercial Carriers, Inc.* ("the 1962 Hoffa trial"),[2] in violation of 18 U.S.C. 1503. Specifically, it was alleged that petitioner offered to make $30,000 available to Nathan Bellamy for the purpose of inducing him to seek to influence two of the jurors in that case, Gratin Fields and Mrs. Matthew Walker, to vote for the acquittal of Hoffa. Following a trial by jury, petitioner was found guilty and sentenced to five years' imprisonmen and to pay a fine of $5,000 (D.A. 122a, 179a-180a).[3] The court of appeals affirmed (Pet. App. A, B, and D).

1. The government's evidence may be summarized as follows:

The 1962 Hoffa trial began in Nashville on October 22 of that year and ended, with a hung jury, on December 23 (G.A. 53b-54b). Gratin Fields and Mrs. Matthew Walker were members of the jury (G.A. 56b). Some time in late October or early No-

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[2] This was the same case out of which the jury-tampering efforts involved in Nos. 794, 795, 796, and 797, this Term, *James R. Hoffa et al.* v. *United States*, pending on limited writs of certiorari, arose.

[3] Count 1 charged petitioner and an unindicted person with having conspired corruptly to endeavor to influence a third juror in the discharge of his duties in the same case. Count 2 charged petitioner with the commission of the substantive offense alleged in count 1. A motion for judgment of acquittal as to count 1, made at the close of the government's case, was granted (G.A. 79b), and petitioner was acquitted by the jury on count 2 (D.A. 122a).

vember, while the trial was in progress, petitioner telephoned Nathan Bellamy at the Blackhawk Cafe, a Nashville restaurant, made an appointment to meet him there in half an hour, and thereafter personally presented himself at the restaurant, where he conversed with Bellamy in a booth for approximately twenty minutes (D.A. 75a-76a, 84a, 87a, 93a; G.A. 59b, 64b-65b, 72b-75b). Bellamy, who operated a numbers business in the basement of the restaurant (D.A. 77a, 82a, 89a-91a; G.A. 58b), had never previously met petitioner (D.A. 83a-84a).

Petitioner, after remarking to Bellamy that he had heard he was "a good gambler" and "could keep [his] mouth shut" (G.A. 65b), asked Bellamy if he knew either of the two jurors, Fields and Walker, referred to above (D.A. 76a; G.A. 60b). Bellamy said he did not (D.A. 76a). Petitioner told Bellamy that it would be "worth a whole lot of money" to Bellamy if Bellamy "could tamper with" the named jurors and "get them to vote for acquittal." He stated that he would "go from five to thirty thousand [dollars]" for this purpose and asked Bellamy to "see what [he] could do about contacting" them (D.A. 76a; G.A. 60b, 64b). Petitioner further remarked that it would "only take one to hang the jury" and that Hoffa "was a Negro's friend" (D.A. 76a).[4] Commenting that the trial would continue until Christmas, he further stated that "that [*i.e.*, an early mistrial] would be a nice Christmas present for the jury so they wouldn't have to be locked up for the holidays" (*ibid.*).

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[4] The two named jurors and Bellamy are Negroes.

Bellamy told petitioner that he "would see what [he] could do" about the matter, and petitioner left (D.A. 93a; G.A. 60b, 75b). Bellamy never heard from petitioner again, nor did he make any effort to communicate with either juror (D.A. 77a, 84a).

2. On February 1, 1963, petitioner appeared pursuant to subpoena before the grand jury which later indicted him. He was informed that the grand jury was inquiring into possible violations of the statute prohibiting corrupt attempts to influence federal jurors and was advised of his right of counsel and of his privilege to refuse to incriminate himself. He was then asked a series of questions, as to each of which he claimed his privilege. The questions related, for the most part, to persons and places which figured in the charges involved in counts 1 and 2 of the indictment (see note 3, *supra*). In addition petitioner was asked whether he knew or had ever heard of two persons—James Tippens and "Red" Medlin—who, so far as appears, had no connection with any of the three counts,[5] and, in general, whether he had ever endeavored, or been a part of any endeavor, to influence any member of the jury in the 1962 Hoffa trial. None of the questions related specifically to the charge in count 3, the only count presently before the Court.[6]

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[5] Tippens was a prospective juror in the 1962 Hoffa trial whom the court had excused after he reported an attempt by Medlin to bribe him. See *United States* v. *Hoffa*, 349 F.2d 20, 26, 39-41 (C.A. 6), pending on limited writs of certiorari, Nos. 794-797, this Term, and pages 7 and 33-36 of the government's brief in opposition to certiorari in those cases.

[6] The government had apparently not yet received any information concerning petitioner's corrupt approach to Bel-

In several instances in the course of the questioning petitioner was asked if he "understood] the question," referring to the question immediately preceding. The foreman of the grand jury directed petitioner to answer the questions of this type (and only those), but he still refused. In a proceeding before the district judge to require petitioner to answer the questions which the foreman had directed him to answer (D.A. 27a-31a), petitioner appeared with counsel [7] and the transcript of his testimony was received in evidence and shown to his attorney (D.A. 29a-30a). The judge, without objection by petitioner's counsel (indeed with his acquiescence), instructed petitioner to answer the questions which the foreman had ordered him to answer (D.A. 30a-31a).

3. At petitioner's trial the court declined to permit defense counsel, in cross-examining the government's witness Bellamy, to show, for impeachment purposes, that he had been convicted in the courts of Tennessee of various misdemeanors arising out of his "numbers business" (D.A. 78a-82a).[8] The court did, however,

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lamy in the Blackhawk Cafe, the subject of count 3. See G.A. 59b and 62b, where it appears that Bellamy's first and only statement to the F.B.I. was made in late March 1963, nearly two months after petitioner's grand jury appearance.

[7] Petitioner apparently engaged the services of the attorney during a recess in the proceedings in open court (D.A. 28a).

[8] The misdemeanors, as referred to by defense counsel in interrogating the witness in the course of an offer of proof, included vagrancy and loitering (six instances), operating a disorderly house (four occasions), loitering around a disorderly house (once), gaming (once), keeping a gaming

permit counsel to cross-examine Bellamy freely concerning his "business". In response to counsel's questions, the witness acknowledged, in the presence of the jury, that he had been "a numbers racket[e]er for some fifteen years," that he was aware that his possession of a "federal stamp" did not give him "a license to violate the state law," that he had nevertheless being doing so for years, and that he had been "actively engaged" in "that law violation business" on the very day when F.B.I. agents came to his place of business to interrogate him about the matters involved at bar (G.A. 61b-62b).

The court subsequently permitted the government to bring out on petitioner's cross-examination, for impeachment purposes, that he had been convicted in 1945, in New York, of the offense of impersonating a police officer with intent to defraud another of $1,500, a misdemeanor under New York law,[9] which the court deemed an offense involving moral turpitude (G.A. 79b-80b, 92b-94b).

ARGUMENT

1. Petitioner contends that his rights were violated when he was subpoenaed to testify before the grand jury which subsequently indicted him (Pet. 4, 23-26). We note preliminarily that, as observed by the court

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house (once), and violating the "State Lottery Law" (twice). The record is unclear as to how many of the offenses involved true convictions and how many involved merely the forfeiture of collateral (see D.A. 80a-81a and the opinion below at Pet. App., pp. 7a-8a).

[9] See New York Penal Law, § 931.

of appeals (Pet. App. A, p. 9a), this issue was not raised by petitioner in his motion to dismiss the indictment (D.A. 2a-3a), nor was it otherwise presented to the district court. There is, in any event, no substance to the claim.

The contention is based on a purely conjectural assumption—that petitioner, when he was called to appear before the grand jury, was a "de facto" defendant, "marked * * * for indictment," against whom the government had already "completed its case" (Pet. 23, 24). There is no basis in the record for this assumption. It does not follow from the fact that petitioner "was interrogated about persons who later testified against him at the trial" (Pet. 23)—the only asserted basis for this claim—either that the government's "case" against petitioner before the grand jury had been "completed" or that the grand jury had already decided to indict him.

At all events, the Fifth Amendment's prohibition against compulsory self-incrimination does not preclude a grand jury from subpoenaing one who, on the basis of other evidence before it, may appear to have committed an offense germane to the jury's inquiry. Subject to the right of the witness to assert his privilege against self-incrimination in response to specific questions, a grand jury is not prohibited from making pertinent inquiries of one who, being himself a subject of the investigation, is a potential defendant. *United States* v. *Winter*, 348 F.2d 204, 206-208 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Annunziato*, 293 F.2d 373, 376 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Cleary*, 265

F.2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Klein*, 247 F.2d 908, 920-921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Scully*, 225 F.2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. The grand jury would be "denude[d] * * * of a substantial right of inquiry" if it were prevented from summoning before it one whom others have accused of crime to inquire what he has to say about the matter before deciding whether to return a true bill. *United States* v. *Winter*, *supra*, 348 F. 2d at 207-208. Petitioner was fully advised both of his right of counsel and of his right not to incriminate himself; and he freely exercised the privilege against self-incrimination. Nor was any statement made by him during his grand jury appearance used against him at his trial. Petitioner's legitimate interests were thus fully protected.[10]

There is likewise no merit to petitioner's related claim (Pet. 4, 25) that the indictment was invalid because the trial court failed to instruct the grand jury that it was not permitted to draw any inference adverse to petitioner from petitioner's claims of privilege. It has never been suggested that a grand jury must be given such an instruction before it can validly indict a witness who has asserted his privilege be-

[10] We also note that the only count on which petitioner was convicted, and thus the only one presently before the Court, involved a matter about which petitioner was not specifically interrogated—apparently because no information concerning it had as yet come to the attention of the government (see p. 5 and note 6, *supra*). Irrespective of the validity of the other counts, therefore, the conviction now in issue was unaffected by petitioner's grand jury appearance.

fore it. In any event, neither petitioner nor his counsel, who represented him in the proceedings to compel answers to certain of the grand jury's questions, made any request for such an instruction.

2. Petitioner urges that it was error for the trial court to refuse to grant him a continuance because of the alleged "saturation of the community mind" with publicity concerning the affairs of Hoffa and his associates, particularly the then recently concluded trial of Hoffa and three codefendants for attempting improperly to influence the same jury which petitioner was charged with endeavoring improperly to approach (Pet. 16-19). The contention is without substance. A motion for a continuance is addressed to the sound discretion of the court. *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *United States* v. *Hoffa*, 349 F. 2d 20, 39 (C.A. 6), pending on writs of certiorari limited to another issue, Nos. 794-797, this Term; *Johnson* v. *United States*, 291 F. 2d 150, 153 (C.A. 8), certiorari denied, 368 U.S. 880. There was no abuse here. The court of appeals fully considered the circumstances (Pet. App. A, pp. 11a-16a) and its decision sustaining the district court's exercise of discretion was correct. We stress that petitioner's counsel was given wide latitude in examining the prospective jurors on *voir dire;*[11] that none of the prospective jurors knew petitioner; and that, while most of the jurors had read more or less about the Hoffa trial, all stated under oath that they could decide the case on the evidence and the law as given to them by the

[11] See G.A. 11b-46b.

trial judge (Pet. App. A, p. 16a). It is significant that, as noted by the court of appeals (*ibid.*), the defense felt it unnecessary to use more than six of the ten peremptory challenges allowed by law.[12]

3. The trial court did not apply a "double standard favoring the government" in its rulings regarding the permissible cross-examination of Bellamy and petitioner (Pet. 19-21). The general rule is that only convictions for felonies and for misdemeanors involving moral turpitude may be shown for impeachment purposes. *Smith* v. *United States*, 283 F. 2d 16, 22 (C.A. 6), certiorari denied, 365 U.S. 847; *Christianson* v. *United States*, 226 F. 2d 646, 655 (C.A. 8), certiorari denied, 350 U.S. 994; *Henderson* v. *United States*, 202 F. 2d 400, 405-406 (C.A. 6). Petitioner's prior offense, impersonating a police officer with intent to defraud another of a substantial sum of money, involved the element of fraud and was clearly a crime of this character. *Jordan* v. *De George*, 341 U.S. 223, 227. The government, accordingly, was properly allowed to elicit his conviction for this offense when he chose to be a witness in his own behalf.[13] Bellamy's prior offenses, on the other hand,

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[12] It is also pertinent to note, with reference to the claim that the community was too saturated with prejudice to be able to give petitioner a fair trial at the time he went to trial, that the jury acquitted him on one of the two charges submitted to it (note 3, *supra*).

[13] There was, moreover, an independent reason for admitting this evidence. Petitioner, in his direct testimony, had put his character in issue. He testified, for example, that he had made church pilgrimages to Tennessee (Transcript 367), that he had been interested in bringing new industry to the

were not of this sort. Violations of laws and ordinances prohibiting lotteries, off-track bookmaking, and kindred activities in which gambling is an element are not generally regarded as offenses characterized by moral turpitude. Cf. *United States* v. *Carrollo*, 30 F. Supp. 3, 7 (W.D.Mo.) (use of the mails in connection with a lottery); *Hofferman* v. *Simmons*, 177 Misc. 962, 966, 32 N.Y.S. 2d 244, 248, affirmed, 264 App. Div. 884, 35 N.Y.S. 2d 925, reversed on other grounds, 290 N.Y. 449 (off-track bookmaking); *Mitchell* v. *State*, 148 Ala. 618, 619 (crap shooting); *State* v. *Donnelly*, 130 Mo. 642, 651 (unspecified gambling). Under the commonly accepted definition of moral turpitude—"[a]n act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general * * *" [14] —wagering-type offenses, even those in

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State (G.A. 83b-84b), and he introduced in evidence a courtesy card issued by the Governor of Tennessee as a "token of the esteem" in which he was held in that State (G.A. 87b-88b). He also put in evidence a letter of commendation which he had received from the Free Cuba Movement expressing appreciation for his efforts on its behalf (G.A. 88b-89b). Since petitioner's counsel argued in his summation to the jury that such evidence showed petitioner's good character (G.A. 97b-99b), this was manifestly the purpose of introducing it. While the prosecution may not initially attack a defendant's character, it may, if the defendant attempts to show his good character, offer evidence of his bad character in rebuttal. *Michelson* v. *United States*, 335 U.S. 469; *Josey* v. *United States*, 135 F.2d 809, 811 (C.A.D.C.).

[14] 2 Bouvier's Law Dictionary, Rawle's 3rd rev., p. 2247. See, also, *Ng Sui Wing* v. *United States*, 46 F. 2d 755, 756 (C.A. 7); *United States* v. *Carrollo*, 30 F. Supp. 3, 6-7 (W.D.Mo.); 27A Words and Phrases (Perm. ed.), *Moral*

which wagering is pursued as a business, cannot be said to involve moral turpitude. Many States, for example, authorize on-track horse-race betting under regulated pari-mutuel systems. At least one jurisdiction (Nevada) broadly licenses a wide variety of gambling enterprises, and another (New Hampshire) itself conducts a large-scale wagering business (a racing sweepstakes) to finance its educational activities.[15]

This is not inconsistent with the statements of public officials regarding the unfortunate consequences of organized gambling (see Pet. App. F, pp. 41a-54a) or with the many State statutes prohibiting gambling.[16] The ruling of the district court in this case simply recognized that there is no consensus in this country that wagering-type offenses amounting to misdemeanors are crimes involving *turpitude* within the sense of the rule of evidence governing testimonial impeachment.[17]

Turpitude, pp. 192-195; 58 C. J. S. 1201. Cf. Webster's Third New International Dictionary, *Turpitude:* "inherent baseness or vileness of principle, words, or actions; depravity * * *."

[15] N. H. Rev. Stats. Ann. (1965 Supp.), §§ 284:21-a *et seq.*

[16] This Court, in *Marvin* v. *Trout*, 199 U.S. 212, 224, observed that "gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals * * *." The Court, accordingly, held that the States could constitutionally suppress it. There is no suggestion in the opinion, however, that gambling is an offense involving turpitude, nor is the decision otherwise germane. Petitioner's reliance on that decision (and other authorities to the same effect) (Pet. 20) is for that reason misplaced.

[17] The court of appeals, in citing the harmless error rule in its supplemental opinion (Pet. App. B, p. 23a), did not, we

4. Petitioner was not entitled to examine a transcript of witness Bellamy's grand jury testimony as a matter of right (Pet. 26-27). The most that he was entitled to, as the court of appeals correctly noted (Pet. App. A, p. 11a), was to request the trial judge to inspect the transcript for any inconsistencies between the witness' grand jury testimony and his trial testimony and to turn over to him such portions of the transcript as might reflect an inconsistency. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 401; *United States* v. *Keegan*, 331 F. 2d 257, 263 (C.A. 7), certiorari denied, 379 U.S. 828; *United States* v. *Giampa*, 290 F. 2d 83, 85 (C.A. 2). There was no such request in this case. There was merely a blanket motion, at the commencement of trial, for leave to inspect the grand jury testimony of all witnesses proposed to be used by the government at the trial (D.A. 53a-54a).[18]

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believe, intend to imply that it considered the limitation placed on the defense in its cross-examination of Bellamy to have been error (see Pet. 21-23). On the contrary, it referred in the opinion to "this alleged error" (Pet. App. B, p. 23a). What the court held was (1) that there had been no error, but (2) that even if there had been it was non-prejudicial in the circumstances of this case.

[18] Petitioner's challenge to the constitution of the grand jury which indicted him (Pet. 13-14, 23) presents, as he acknowledges, "the same issue based on identical facts" (Pet. 14) as the like challenge made in the petition for a writ of certiorari in *Hoffa* v. *United States*, No. 794, this Term. The contention was fully answered in the government's brief in opposition in that case, at pp. 17-20, and the Court's order of January 31, 1966, granting certiorari, limits the scope of the writ to a different issue. There is accordingly no occasion to reply further to this contention at this time.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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